

**UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD**

2012 MSPB 31

Docket No. SF-0752-11-0051-I-1

**George M. Ellis,
Appellant,**

v.

**Department of the Navy,
Agency.**

March 7, 2012

George M. Ellis, San Clemente, California, pro se.

Jennifer Gazzo, Camp Pendleton, California, for the agency.

BEFORE

Susan Tsui Grundmann, Chairman
Anne M. Wagner, Vice Chairman
Mary M. Rose, Member

OPINION AND ORDER

¶1 The appellant has filed a petition for review in this case asking us to reconsider the initial decision in which the administrative judge dismissed his appeal of an alleged reduction in grade or pay for lack of jurisdiction. For the reasons set forth below, we DENY the appellant's petition for review and AFFIRM the initial decision AS MODIFIED by this Opinion and Order, still DISMISSING the appeal for lack of jurisdiction.

BACKGROUND

¶2 On April 27, 2009, the appellant received an appointment to the position of YA-0301-02 Range and Training Planner within the National Security Personnel System (NSPS). Initial Appeal File (IAF), Tab 8, Subtab 4c(i). On October 28, 2009, the President signed into law the National Defense Authorization Act for Fiscal Year 2010, Pub. L. No. 111-84, 123 Stat. 2190, 2498, which repealed the statutory authority for the NSPS and called for the conversion of all employees and positions under NSPS to the pay system and all other aspects to the personnel system that applied prior to conversion to NSPS, or that would have applied had NSPS never been established. *Id.*, § 1113(b)-(c). Effective June 20, 2010, the agency converted the appellant's position to GS-0301-12 Range and Training Planner. IAF, Tab 8, Subtabs 4b, 4c.

¶3 The appellant filed an appeal in which he alleged that the agency reduced him in pay and grade, violated the terms of his appointment, and failed to comply with [5 C.F.R. § 9901.372](#) in converting him to the General Schedule. The administrative judge found that the appellant did not make a nonfrivolous allegation that he had been reduced in pay or grade, and he dismissed the appeal for lack of jurisdiction. IAF, Tab 17. The appellant petitions for review.

ANALYSIS

¶4 We see no reason to disturb the administrative judge's determination that the appellant failed to make a nonfrivolous allegation of jurisdiction over his appeal as a reduction in pay. We also find that the appellant has not made a nonfrivolous allegation that he was reduced in grade.

¶5 By statute, the Board has jurisdiction over an employee's reduction in grade. [5 U.S.C. §§ 7512\(3\), 7513\(d\)](#); *Arrington v. Department of the Navy*, [2012 MSPB 6](#), ¶ 10. "Grade" means "a level of classification under a position classification system." [5 U.S.C. § 7511\(a\)\(3\)](#); *Arrington*, [2012 MSPB 6](#), ¶ 10. OPM's regulations similarly define "grade" as "a level of classification under a

position classification system.” [5 C.F.R. § 752.402](#); *Arrington*, [2012 MSPB 6](#), ¶ 10.

¶6 As we found in *Arrington*, the appellant’s conversion from a YA-02 position within the NSPS to a GS-12 position within the General Schedule did not result in an appealable reduction in grade. Neither 5 U.S.C. chapter 75 nor 5 C.F.R. part 752 indicates how a reduction in grade is to be determined where, as here, there is movement with no reduction in pay across or between position classification systems. *Arrington*, [2012 MSPB 6](#), ¶ 12; *cf. Peele v. Department of Health & Human Services*, [6 M.S.P.R. 296](#), 299 (1981) (finding no reduction in grade when a position was moved from the General Schedule to a position not under a position classification system). Nor is there any language in the 2009 Act repealing the NSPS or elsewhere in the NSPS statutes or regulations to indicate that the appellant’s conversion, standing alone, would constitute an appealable reduction in grade under [5 U.S.C. § 7512](#). Additionally, we find nothing in the 2009 Act or elsewhere in the NSPS statutes and regulations that would provide an independent basis for the Board review of the appellant’s conversion from the NSPS to the General Schedule. Thus, the appellant failed to make a nonfrivolous allegation that his conversion from NSPS to the General Schedule constituted an appealable reduction in grade.

¶7 We recognize that we reached a different result in *Arrington*, [2012 MSPB 6](#). In that case, the appellant occupied a GS-14 position before the NSPS was created, was converted into the NSPS, and then was converted back into the General Schedule at the GS-13 level when the NSPS was abolished. The Board found that, under the unique circumstances surrounding the institution of the NSPS and its subsequent repeal, and given the broad Congressional intent that employees not be harmed when their positions were converted back into the General Schedule, the cumulative effect of the personnel actions effected in that case was a reduction in grade from a GS-14 position to a GS-13 position. *Arrington*, [2012 MSPB 6](#), ¶ 13 & n.7.

¶8 Here, however, the appellant was hired into the NSPS. There is no evidence that the appellant ever occupied a GS-13 position prior to his conversion to GS-12, and there is no cumulative series of transactions to consider as there was in *Arrington*. Although the appellant contended that the agency designated his position as a GS-13 “equivalent,” he did not provide any evidence in support of his assertion until he filed his petition for review. Petition for Review (PFR) File, Tab 1, Enclosure 1. Because he has neither explained why he did not submit this evidence below nor shown that the evidence is material to the outcome of this case, we have not considered it. See *Russo v. Veterans Administration*, [3 M.S.P.R. 345](#), 349 (1980); *Avansino v. U.S. Postal Service*, [3 M.S.P.R. 211](#), 214 (1980). Further, while [5 C.F.R. § 9901.372](#) provides for the calculation of a “virtual” General Schedule grade, the “virtual grade” is used solely for pay-setting purposes. Thus, there is no merit to the appellant’s apparent claim that the virtual General Schedule grade plays a role in determining whether there has been a reduction in grade when a position is converted from a YA pay band under the NSPS to a General Schedule position. Therefore, we find that the analysis in *Arrington* does not apply here.

¶9 The appellant’s allegation that the agency failed to comply with [5 C.F.R. § 9901.372](#) is likewise unavailing, as there is no indication in the applicable statute or regulations that an agency’s alleged violation of § 9901.372 is appealable to the Board. See *Shifflett v. Department of the Navy*, [83 M.S.P.R. 472](#), ¶ 5 (1999) (an allegation that an agency failed to follow its own procedures is not independently appealable). To the extent that the administrative judge analyzed the appellant’s reduction in grade claim under [5 C.F.R. § 9901.372](#), she properly concluded that the appellant failed to nonfrivolously allege that he was reduced in grade and, therefore, any adjudicatory error did not prejudice the appellant’s substantive rights. *Panter v. Department of the Air Force*, [22 M.S.P.R. 281](#), 282 (1984).

¶10 The appellant's challenge to the process by which the agency classified his position and its determination that the proper level was a GS-12 also provides no basis for a finding of jurisdiction. The Board has not been granted jurisdiction over cases concerning the proper classification of a position, either by statute or regulation. *Pierce v. Merit Systems Protection Board*, [242 F.3d 1373](#), 1375-76 (Fed. Cir. 2001); *Beaudette v. Department of the Treasury*, [100 M.S.P.R. 353](#), ¶ 12 (2005). Likewise, absent jurisdiction over the underlying appeal, the Board lacks jurisdiction to consider the appellant's vague claim that the agency violated unspecified merit system principles. *See Davis v. Department of Defense*, [105 M.S.P.R. 604](#), ¶ 15 (2007).

¶11 The appellant contends for the first time on review that there is "an air of agency bias against veterans." He may be alleging that, in taking these actions, the agency discriminated against him and certain others on the basis of their military service. There is no time limit for filing an appeal with the Board under the Uniformed Services Employment and Reemployment Rights Act of 1994 (codified at [38 U.S.C. §§ 4301-4333](#)) (USERRA). [5 C.F.R § 1208.12](#). Therefore, the appellant is advised that he may, if he wishes, file a USERRA appeal regarding these matters with the regional office.

¶12 Finally, the appellant submits with his petition for review 22 documents ("enclosures") that we have not considered because they do not constitute new and material evidence. Enclosures 6, 14, 16, and 19 are all a part of the record below.¹ Enclosures 1, 4, 5, 7-11, 13, 15, 17, and 20-22 are all dated prior to the close of the record and the appellant has not shown that they were unavailable before the record closed.² The remaining four documents, Enclosures 2, 3, 12,

¹ *See Meier v. Department of the Interior*, [3 M.S.P.R. 247](#), 256 (1980) (evidence that is already a part of the record is not new).

² *See Avansino*, 3 M.S.P.R. at 214 (the Board will not consider evidence submitted for the first time with the petition for review absent a showing that it was unavailable before the record was closed despite the party's due diligence).

and 18, are undated, but the appellant has not shown how they bear on the dispositive jurisdictional issue in this case.³ After the record closed on review, the appellant submitted a reply to the agency's response and another submission consisting of five enclosures. PFR File, Tabs 4, 6. The Board's regulations do not provide for the submission of replies to responses to petition for review. [5 C.F.R. § 1201.114](#)(i). Additionally, because the appellant has not shown that the information submitted with his reply to the agency's response to the petition for review and his subsequent submission are *both* based on information not readily available before the record closed on review despite his due diligence *and* are of sufficient weight to warrant a different outcome, they are not new and material evidence and we have not considered them. [5 C.F.R. § 1201.114](#)(i).

ORDER

¶13 This is the final decision of the Merit Systems Protection Board in this appeal. Title 5 of the Code of Federal Regulations, section 1201.113(c) ([5 C.F.R. § 1201.113](#)(c)).

NOTICE TO THE APPELLANT REGARDING YOUR FURTHER REVIEW RIGHTS

You have the right to request the United States Court of Appeals for the Federal Circuit to review this final decision. You must submit your request to the court at the following address:

United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, DC 20439

³ See *Russo*, 3 M.S.P.R. at 349 (the Board will not grant a petition for review based on new evidence absent a showing that it is of sufficient weight to warrant an outcome different from that of the initial decision).

The court must receive your request for review no later than 60 calendar days after your receipt of this order. If you have a representative in this case and your representative receives this order before you do, then you must file with the court no later than 60 calendar days after receipt by your representative. If you choose to file, be very careful to file on time. The court has held that normally it does not have the authority to waive this statutory deadline and that filings that do not comply with the deadline must be dismissed. *See Pinat v. Office of Personnel Management*, [931 F.2d 1544](#) (Fed. Cir. 1991).

If you need further information about your right to appeal this decision to court, you should refer to the federal law that gives you this right. It is found in Title 5 of the United States Code, section 7703 ([5 U.S.C. § 7703](#)). You may read this law, as well as review the Board's regulations and other related material, at our website, <http://www.mspb.gov>. Additional information is available at the court's website, www.cafc.uscourts.gov. Of particular relevance is the court's "Guide for Pro Se Petitioners and Appellants," which is contained within the court's [Rules of Practice](#), and [Forms 5, 6, and 11](#).

FOR THE BOARD:

William D. Spencer
Clerk of the Board
Washington, D.C.